dure could be carried out with reasonable despatch in less than two months to which should be added a further period of one month for the notice for terminating his employment.

Appeal dismissed.

Solicitors: *J.B. Jeyaretnam & Co.; Drew & Napier.*

HIAP SOON & CO. (PTE.) LTD. v. CHIP HONG TRADING CO.

[C.A. (Wee Chong Jin C.J., Sinnathuray & Thean JJ.), April 29, 1985]

[Singapore – Civil Appeal No. 3 of 1983]

Contract – Oral contract for sale of timber – Recovery of timber price – Denial of contract by defendant.

Evidence – Plaintiffs' account of oral contract – Denial by defendants – Demeanour and manner of witnesses – Documentary evidence and commercial nature of transaction – Credibility.

In this case, the respondents sued the appellants for the price of certain quantity (2,540.59 cubic metres) of Indonesian timber allegedly sold and delivered by the respondents to the appellants under an oral contract said to have been made on April 20, 1977, over a telephone conversation in Singapore between Yauw Cheng Kwee of the respondents and Ng Kar Chong of the appellants. The respondents' case was that pursuant to the contract, they loaded 2,540.59 cubic metres of timber to the appellants' vessel at Telok Air, Pontianak, and delivered the timber to Tan Cheng Peow and other representatives of the appellants at Pontianak and the Chief Officer of the vessel "Pan United 3/7".

The appellants denied the existence of any contract between them and the respondents. The appellants did not deal in timber and they denied that there was a telephone conversation on April 20, 1977 as alleged by the respondents. There was no dispute that in fact 2,540.59 cubic metres of timber were loaded at Telok Air in May 1977 on a dumb barge chartered, not by the appellants, but by Hiap Bee Timber Co. (Pte.). The appellants' case at the trial was that the timber loaded on the barge was delivered pursuant to a written contract entered into on March 19, 1977 between Hiap Bee and an Indonesian firm C.V. Trimulya Timber Co.

The real issue before the trial judge was whether there was only one contract, *i.e.*, the written contract of March 19, 1977 between Trimulya and Hiap Bee, or whether there was another contract, *i.e.*, the oral contract of April 20, 1977 between the respondents and the appellants, as alleged by the respondents and denied by the appellants. The learned trial judge gave judgment for the respondents, and the appellants appealed.

Held, allowing the appeal: (1) the trial judge founded his decision, not on a finding that Yauw Cheng Kwee was a credible witness because of that witness's manner and demeanour but of the credibility of another witness, one Indonesian Mr. Salim who traded in timber and who said he had been paid by the appellants for his timber. The trial judge appeared to have given no consideration at all to the undisputed facts. In addition, the learned trial judge did not appear to have considered or appreciated that on an analysis of the evidence of Yauw Cheng Kwee of the respondents his allegation that he made the oral contract with Ng Kah Chong over the telephone on April 20, 1977 could not be accepted;

(2) having regard to the real issue, the documentary evidence and the commercial nature of the whole transaction had to be considered together with the manner and demeanour of the two vital witnesses (Yauw and Ng) in order to arrive at a conclusion which account is credible or not. In this regard Yauw Cheng Kwee's account was not credible. The trial judge was plainly wrong in giving judgment for the respondents.

Case referred to:

(1) *Coghlan* v. *Cumberland* [1898] 1 Ch. 704.

COURT OF APPEAL.

Joseph Grimberg (*H. S. Narulla* with him) for the appellants.

Goh Aik Chew for the respondents.

Cur. Adv. Vult.

Wee Chong Jin C.J. (delivering the Judgment of the Court) : The appellants, Hiap Soon & Co. (Pte.) Ltd., were sued by the respondents Chip Hong Trading Co. for the price of 2,540.59 m^3 Indonesian timber allegedly sold and delivered by the respondents to the appellants under an oral contract said to have been made on April 20, 1977.

The respondents' case, as pleaded, was that the contract was made orally between the parties "around April 20, 1977 over a telephone conversation between Yauw Cheng Kwee of the (respondents) and Ng Kar Chong of the (appellants) in Singapore". They further averred that under the contract the appellants agreed to purchase from them 6000 m^3 of Indonesian (Red Meranti) Round Logs "Average Price F.O.B. Pontianak US$43 per m^3" and that pursuant to the contract they loaded 2,540.59 m^3 on to the appellants' vessel at Telok Air, Pontianak and delivered the timber to Tan Cheng Peow and other representatives of the (appellants) at Pontianak and the Chief Officer of

the vessel "Pan United 3/7".

The appellants' case was that there was never any contract between the parties for the purchase of timber by the appellants from the respondents. They did not deal in timber. They denied that there was a telephone conversation on April 20, 1977 as alleged by the respondents. There was no dispute that in fact 2,540.59 m^3 of Indonesian (Red Meranti) Round Logs were loaded at Telok Air, Pontianak from May 13 to 19, 1977 on a dumb barge chartered, not by the appellants, but by Hiap Bee Timber Co. (Pte.). The dumb barge together with its tow, a motor tug "Pan United No. 3" had arrived at Telok Air on April 10, 1977 to take delivery of timber under a written contract between Hiap Bee Timber Co. (Pte) Ltd. ("Hiap Bee") and a Indonesian firm C.V. Trimulya Timber Co. ("Trimulya").

The appellants' case at the trial was that the timber loaded on the dumb barge was delivered pursuant to the aforesaid contract between Hiap Bee and Trimulya which was entered into on March 19, 1977, Clause (5) of which provided as follows:

> "(5) Payment : By confirm, irrevocable, without recourse and unrestricted Letter of Credit in full and accorded to this contract in favour of Chip Hong Trading Co., 30A Church Street, Singapore 1, to be available for their draft or drafts at sight in one or divided drawing, and to be valid for no less than 30 days after the latest date allowed for shipment."

The respondents did not dispute the existence of the contract between Trimulya and Hiap Bee nor did they dispute that they were and had acted as Trimulya's agents and the appellants were Hiap Bee's agents and financiers under that contract. Their case at the trial was that they were suing the appellants under a different contract which was concluded orally between them and the appellants on April, 1977 over a telephone conversation between Ng Kar Chong of the appellants and Yauw Cheng Kwee, the main and active partner of the respondents.

The other undisputed facts which were in evidence, documentary or otherwise, showed that:

(1) when the chartered vessels arrived at Telok Air ready to take delivery under the Trimulya /Hiap Bee contract, Trimulya had insufficient timber and demurrage was claimed by Hiap Bee;

(2) the demurrage claim was addressed to the respondents on April 15, 1977;

(3) the respondents replied on April 16, 1977 to Hiap Bee disclaiming their responsibility for demurrage and stating they had asked Trimulya "to settle the matter with Mr. Tan Cheng Peow as Mr. Tan is now in Pontianak";

(4) Tan Cheng Peow was the director of Hiap Bee who had signed the Trimulya/Hiap Bee contract on behalf of Hiap Bee and who was at Telok Air since early April 1977 to take delivery under that contract;

(5) Tan Cheng Peow inspected and graded the actual timber loaded on the chartered vessels between May 13 and 19, 1977;

(6) Trimulya wrote on April 1977 to Hiap Bee agreeing to accept demurrage charges and to pay through "their company's agents in Singapore Messrs Chip Hong Trading Co. (the respondents). The letter also stated logs would be available latest April 25, 1977 for loading;

(7) Trimulya sent a copy of their letter of April 21, 1977 to the respondents;

(8) Trimulya and Hiap Bee treated the 2,540.49 M^3 timber loaded on the chartered vessels as delivery under their March 19, 1977 contract and had agreed the price at US$22 per M^3 for that delivery;

(9) On June 15, 1977 Hiap Bee paid to the respondents $100,000 who received the payment as agents of Trimulya. Yauw Cheng Kwee in his evidence admitted receiving payment but later retracted it;

(10) The appellants and the respondents were not in the timber business and Yauw Cheng Kwee and Ng Kah Chong had never met one another before April 20, 1977.

It is clear from the pleadings and throughout the trial that the real issue before the trial judge was whether there was only one contract, *i.e.*, the written contract of March 19, 1977 between Trimulya and Hiap Bee or whether there was another contract between the respondents and the appellants, as alleged by the respondents and denied by the appellants, *i.e.*, an oral contract concluded during a telephone conversation on April 20, 1977 which was conducted between Yauw Cheng Kwee of the respondents and Ng Kah Chong of the appellants.

The learned trial judge gave judgment for the

respondents but after the conclusion of the appeal we reversed his decision and now give our reasons. Having regard to the real issue we have just mentioned the acceptance of Yauw Cheng Kwee's account of the alleged telephone conversation or of Ng Kah Chong's denial of that telephone conversation depended not only on the manner and demeanour of these two witnesses but also on a consideration of the entire evidence in particular the undisputed facts we have briefly outlined earlier.

As Lindley L.J. in *Coghlan* v. *Cumberland*[1] said:

"Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not; and these circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the Court had not seen."

It is clear from a reading of the trial Judge's written judgment that he founded his decision, not on a finding that Yauw Cheng Kwee was a credible witness because of that witness' manner and demeanour, but in his view of the credibility of another witness who gave evidence on behalf of the respondents. That witness, a Mr. Salim, an Indonesian who said he traded in timber, said it was his timber which was loaded on the chartered vessels and that he had been paid by the appellants for that timber. The trial judge appeared to have given no consideration at all to the undisputed facts.

In addition, the learned trial judge did not appear to have considered or, if he had, to have appreciated that on an analysis of the evidence of Yauw Cheng Kwee his allegation that he made the oral contract with Ng Kah Chong over the telephone on April 20, 1977 could not be accepted. We quote below *verbatim* his evidence on the alleged telephone conversation:

"On April 20, 1977 one Wong Kah Chong from Defendants telephoned me and complained to me that goods had not been delivered. At that time he was not known to me. Ng Kah Chong is Hokkien: in Foochow Wong Kah Chong. Apart from that he also told me that he was running short of timber, as the timber had to be delivered from Pontianak to Singapore. Timber sold F.O.B. Singapore. The purchaser had to find the vessel to carry the timber. Wong Kah Chong was already there waiting for the cargo but that there was no cargo to load. DAB8 dated March 29, 1977 from Defendants to Plaintiff.

DAB13 – Notice of Readiness to load to Trimulya.

When Wong Kah Chong telephoned me on April 20, 1977 he was very excited because there was no timber to load. He requested to locate other timber merchants in Pontianak to meet the need. I managed to find Mr. N. Salim of Pontianak, a timber merchant who had ready timber to the extent of Trimulya's contract. I was to buy from Salim and resell to the Defendants. I purchased from Salim at $30/- per cu. ton and Hiap Soon was to pay A$39/- per cu. ton. Payment has to be paid under the original L.C., the number of which I can't remember. The original L.C. was made transferable by DAB14 dated April 11, 1977."

We have grave doubts on the credibility of this piece of evidence. First, on Yauw Cheng Kwee's own admission, Ng Kah Chong was not known to him at the time when the telephone call was made. Secondly, it was not in dispute that that was the only telephone conversation he had with Ng Kah Chong relating to the alleged oral contract. Thirdly, it is impossible within the constraint of one telephone conversation for Yauw Cheng Kwee to have located N. Salim, a timber merchant in Pontianak, struck a bargain with him and then entered into the alleged oral contract with Ng Kah Chong. Lastly, it was not in evidence that he offered to sell the timber to Ng Kah Chong at $39 per cubic ton and that Ng Kah Chong accepted such an offer. The essential ingredients of a contract – offer and acceptance – were totally absent. There was no evidence that after the telephone conversation Yauw Cheng Kwee made enquiry and located N. Salim who was prepared to sell the required quantity of timber to him at $30 per cubic ton and he later communicated with Ng Kah Chong on the telephone and sold to the latter the same quantity of timber at $39 per cubic ton.

In our opinion having regard to the real issue, the documentary evidence and the commercial nature of the whole transaction had to be considered together with the manner and demeanour of the two vital witnesses in order to arrive at a conclusion which account is credible or not. Apart from

manner and demeanour the documentary evidence and the commercial nature of this transaction showed that Yauw Cheng Kwee's account that Ng Kah Chong telephoned him on April 20, 1977 and concluded on behalf of the appellants the contract with and as alleged by the respondents was not credible. We were satisfied on a full review of the entire evidence, oral and documentary, that the trial judge was plainly wrong in giving judgment for the respondents.

Appeal allowed.

Solicitors : *H. S. Narulla; Goh Aik Chew & Co.*

EXCELSIOR PTE. LTD. v. EXCELSIOR SPORT (S) PTE. LTD.

[O.C.J. (Chua J.), March 19, 1985]

[Singapore – Suit No. 991 of 1982]

Trade Name – Passing-off – Use of particular word in trade name – Fancy word – "Excelsior" used by plaintiffs for 34 years – Defendants' use of the word – Same or similar business activities – Confusion – Injunction – Damages.

This case concerns passing-off involving the use of a particular word in a trade name. The plaintiff company was incorporated in Singapore on January 17, 1947 and continuously carried on business there as a supplier of a variety of swimwear, sportswear and other clothing, trading at No. 66, High Street. The defendant company was incorporated in Singapore some 34 years later on April 18, 1981 and carried on essentially the same business as a supplier of sportswear and other clothing, trading at Peninsula Plaza not far away and using a name which clearly resembled that of the plaintiffs. The plaintiffs claimed that in the course of their business they had made exclusive use of the name "Excelsior Pte Ltd" and had acquired goodwill and reputation in the name or word "Excelsior". They said that the defendants' use of the name "Excelsior represented and/or held out to the public in Singapore that its business is associated or connected with the plaintiffs and/or that the defendants were the authorized agents of the plaintiffs. They said that such representation or holding out did or was calculated to annex to the defendants' business some part of the goodwill and reputation which had become annexed to the plaintiffs' business in Singapore or to pass off the defendants' business as and for the plaintiffs' business, and this led to the defendants' business being confused with the plaintiffs' business. The plaintiffs claimed that they have thereby suffered and continue to suffer loss and damage. They claimed an injunction to restrain the defendants from using the word "Excelsior" in their business.

The defendants said that they were associated in Hong Kong with a company with a similar name and their choice of their name was not intended to deceive or confuse.

Held: (1) the law relating to passing-off in relation to goods and to passing-off of trade name is the same;

(2) the evidence shows that the plaintiffs and defendants carry on the same or similar business activities. The prominent word of the two names is "Excelsior". It is not a common word, neither is it descriptive of the two businesses. It is a fancy word which the plaintiffs have used for 34 years. The close resemblance of the two names has caused and is likely to continue to cause confusion;

(3) there has been a clear breach of the plaintiffs' right to their trade name and that right has been infringed in circumstances which require that the Court should intervene to prevent future infringement;

(4) the plaintiffs were entitled to judgment with costs and $100 damages and an injunction in terms of prayer 1 of their Claim and the injunction should be suspended for a period of sixty days to enable the defendants to effect a change of their name to a name acceptable to the Registrar of Companies which does not include the name "Excelsior".

Cases referred to:

(1) *Reddaway* v. *Banham* [1896] A.C. 199.
(2) *The North Cheshire and Manchester Brewery Co., Ltd.* v. *Manchester Brewery Co. Ltd.* [1899] A.C. 83.
(3) *The Dunlop Pneumatic Tyre Co. Ltd.* v. *The Dunlop Motor Co.* [1907] A.C. 430.
(4) *Mun Loong Co. Sdn. Bhd.* v. *Chai Tuck Kin* [1982] 1 M.L.J. 356.
(5) *Ewing* v. *Buttercup Margarine Co. Ltd.* [1917] 2 Ch. 1.
(6) *Office Cleaning Services Ltd.* v. *Westminster Window and General Cleaners Ltd.* (1946) 63 R.P.C. 39.
(7) *Procea Products Ltd.* v. *Evans & Sons Ltd.* (1951) 68 R.P.C. 210.
(8) *Henderson* v. *Radio Corporation Pty. Ltd.* [1969] R.P.C. 218.

CIVIL SUIT.

Joseph Grimberg (*Loo Choon Hiaw* with him) for the plaintiffs.

Aloysius Leng for the defendants.

Cur. Adv. Vult.

Chua J.: The Plaintiffs, Excelsior Pte. Ltd., claim an injunction to restrain the Defendants, Excelsior Sport (S) Pte. Ltd., from using the word "Excelsior" in the name of the business known as Excelsior Sport (S) Pte. Ltd. carried on by them in Singapore.

The Plaintiff Company was incorporated in Singapore on January 17, 1947, and continuously